No. 17-494

IN THE

Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.,

Respondents.

On Writ of Certiorari to the Supreme Court of South Dakota

BRIEF OF RETAIL LITIGATION CENTER, INC. AND 21 RETAIL AND WHOLESALE DISTRIBUTION TRADE ASSOCIATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amici represent every aspect of the retail industry.

The **Retail Litigation Center, Inc.,** represents many of the country's largest and most innovative retailers, who employ millions nationwide, provide goods and services to millions more, and account for billions of dollars in annual sales.

The **National Retail Federation** is the world's largest retail trade association, representing retailers of all sizes and types and advocates for fairness and opportunity for all sectors of retail.

The **American Specialty Toy Retailing Association** is an international not-for-profit trade organization that serves independent retailers, manufacturers and sales representatives of the specialty toy industry who focus on what the child can do, rather than what the toy can do.

The **American Lighting Association** is a trade association representing over 3,000 manufacturers, manufacturers' representatives, retail showrooms, and lighting designers in the residential lighting, ceiling

[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party, or any other person other than the *amici curiae* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. On January 31, 2018, and February 5, 2018, respectively, Petitioner and Respondents gave blanket consent to *amicus* briefs.

fan, and controls industries in the United States, Canada, and the Caribbean.

The **American Supply Association** is the national organization that serves more than 330 independent and generational family wholesaler-distributors and manufacturers in the plumbing, heating, cooling, piping, industrial pipe, and valve fittings industry.

The **American Veterinary Medical Association** is the largest veterinary medical association, with more than 91,000 members nationwide who advise pet owners about their choices with respect to pet food, treatments, and related products.

The **Auto Care Association** is a national trade organization with 3,000 members representing more than 150,000 independent businesses that manufacture, distribute and sell motor vehicle parts and accessories and perform vehicle service and repair.

The **Council of State Retail Associations** was organized to improve and advance the retail industry through close cooperation and mutual assistance among state retail association executives and acts as a forum for discussion of important issues on state legislation and regulations affecting the retail industry.

The **Food Industry Association Executives** is a national professional association that represents local, state and regional food association executives, provides a forum for professional growth of the members' employees, and serves as a vehicle for the idea interchange and advancement of the food industry agenda.

The **Home Furnishings Association** represents more than 1,800 members with more than 7,000 store-

fronts globally, ranging from top 100 retailers to smaller local merchants and emerging entrepreneurs.

The **Independent Office Products and Furniture Dealers Association** represents over 900 local and family-owned businesses nationwide and provides office product and furniture dealers with the tools to be successful in today's rapidly changing business environment.

Jewelers of America is the national trade association representing the business interests of jewelers, including approximately 3,000 retailers and suppliers representing approximately 8,000 retail storefronts nationwide.

The **National Association of College Stores**, is the trade association for educational institutions' campus retail stores. Serving nearly 4,000 campuses in the United States, the association represents campus stores that supply course materials, merchandise, and services to campuses across the country.

The **National Grocers Association** is the national trade association representing the retail and wholesale grocers that comprise the independent sector of the food distribution industry, accounting for over $131 billion in annual sales and nearly 1 million American jobs.

The **National Association of Electrical Distributors** is the trade association for the $100+ billion electrical distribution industry operating in more than 6,000 locations nationally and internationally.

The **National Association of Wholesaler-Distributors** is a nonprofit trade association that serves as the national voice of wholesale distribution

and represents businesses of all sizes that engage in the wholesale and distribution trades of every sort of nondurable and durable product.

The **National Ski and Snowboard Retailers Association** is a volunteer-led organization, serving as the voice of specialty retailers and dedicated to growing snow sports participation and to supporting and educating specialty snow sports retailers.

The **National Sporting Goods Association** is the leading voice for sporting goods retailers, representing owners and operators of more than 21,000 storefronts nationwide with a mission to support members to grow their businesses and to advocate on their behalf.

The **North American Retail Hardware Association**'s mission is to help independent hardware stores, home centers and lumberyards become better and more profitable retailers by providing information, communication, training programs and networking opportunities for the industry it serves.

The **Outdoor Industry Association** is the national trade association for more than 1200 suppliers, manufacturers and retailers in the $887-billion outdoor recreation industry, which supports 7.6 million American jobs, contributes $80 million annually in taxes, and makes significant contributions towards health communities and healthy economies across the nationwide.

The **Running Industry Association** represents independent, locally-owned specialty running retailers in the United States, with a mission to promote the health of these businesses through education, collaboration with vendors, financial support, and advocacy.

The **Retail Industry Leaders Association** represents more than 200 retailers, product manufacturers, and service suppliers, accounting for more than $1.5 trillion in sales and millions of jobs.

* * *

All of these *amici* agree that, by distorting the retail market in favor of absentee e-commerce, the physical-presence requirement is "inflicting extreme harm and unfairness" on both "States" and "local retailers." *Direct Mktg. Ass'n v. Brohl (DMA)*, 135 S. Ct. 1124, 1134-35 (2015) (Kennedy, J., concurring). That harm continues to grow even as the physical-presence requirement's legal and theoretical bases—articulated in *National Bellas Hess, Inc. v. Department of Revenue of Ill.*, 386 U.S. 753 (1967), and *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992)—have dwindled to nil. *See Direct Mktg. Ass'n v. Brohl (DMA II)*, 814 F.3d 1129, 1151 (10th Cir. 2016) (Gorsuch, J., concurring).

Over the past quarter century, the ubiquity and ease of networked computing has transformed retail commerce in ways unforeseen when *Quill* reaffirmed *Bellas Hess* in 1992. The word "internet" does not appear in *Quill*, which addressed the "goliath" mail-order industry, with sales of about $180 billion. 504 U.S. at 303. Since then, the internet has changed everything. As Justice Kennedy observed: "By 2008, e-commerce sales alone totaled $3.16 *trillion* per year in the United States." *DMA*, 135 S. Ct. at 1135 (emphasis added). By 2015, such sales totaled $5.71 tril-

lion.[2] The mail-order "goliath" has given way to an e-commerce leviathan.

Amici's members have met e-commerce's market forces by incorporating technology into their businesses to provide superior service to their customers at reduced costs. But no amount of ingenuity can overcome the unfair advantage that *Bellas Hess* and *Quill* give to absentee retailers by making their online sales appear duty-free. Thus, *amici* have a vital interest in whether this Court upholds South Dakota's law as a fair and administrable approach to evaluating "substantial nexus" in today's economy.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The question before this Court is whether South Dakota may require all companies engaged in substantial in-state retail activity to collect sales taxes. Absentee retailers, *i.e.*, companies with no physical presence in the communities into which they sell their goods, insist that the dormant Commerce Clause categorically exempts them from that "minor ... duty." *DMA*, 135 S. Ct. at 1135 (Kennedy, J., concurring). But South Dakota's even-handed approach is perfectly consistent with this Court's usual application of the Commerce Clause to state taxation. Such an economic-presence approach is necessary for sales taxes to work fairly in a retail world increasingly dominated by e-commerce. The Court should uphold South Dakota's law and inter

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[2] William F. Fox, *Inability to Collect Sales Tax on Remote Sales Still Harms the Economy*, State Tax Notes 575, 576 (Nov. 6, 2017).

once and for all the outmoded *per se* physical-presence requirement of *Bellas Hess* and *Quill*, which is "inflicting extreme harm and unfairness" on both States and "local retailers." *Id.* at 1134-35.

Absentee retailers have fought for the physical-presence requirement not because collecting taxes is a crippling burden, but because being exempt from that obligation gives them "a competitive advantage, a sort of judicially sponsored arbitrage opportunity or 'tax shelter.'" *DMA II*, 814 F.3d at 1150 (Gorsuch, J., concurring). In Respondent Wayfair.com's own words: "One of the best things about buying through Wayfair is that we do not have to charge sales tax."[3] To be clear, use or sales taxes are still owed on those transactions, *DMA*, 135 S. Ct. at 1127, but States struggle to collect them because of logistical challenges and consumer ignorance. Thus, absentee retailers' products appear to be discounted relative to their Main Street competitors'. As even Respondent Overstock.com concedes, this "pricing advantage" is based on a factor (sales-tax collection) that should not "enter the equation of free commerce and competing businesses."[4]

Because the precondition to that "pricing advantage" is physical absence, the sales thus won *necessarily* drain money away from both the private and the public sectors of local communities. Online-only retail-

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[3] Wayfair.com: Ordering Information, https://www.wayfair.com/customerservice/ordering_info.php?rtype=7&redir=sales+tax#tax (last visited Feb. 28, 2018) ("Ordering Information").

[4] Overstock.com, https://www.overstock.com/downloads/pdf/Benefits_of_Equity_in_Sales_Tax_Collection_Act.pdf (last visited Feb. 28, 2018) ("Benefits of Equity").

ers like Respondents shun Main Street (even when doing so is inefficient) because this "pricing advantage" offsets their increased costs.[5] For instance, Amazon, which began as an online-only bookseller, originally established its headquarters and warehouses far from population centers in order to avoid "collect[ing] sales taxes in the country's most populous states"; it also micromanaged its employees' work travel "to avoid triggering unwanted sales tax liabilities."[6] This gave Amazon a "price advantage against established physical retailers like Barnes & Noble" that had to collect sales taxes.[7] So, when "the only general-interest bookstore in the New York City borough of the Bronx" closed, it was understood that Amazon would "fill the gap" left by that missing Barnes & Noble.[8] And the distortion today goes beyond community bookstores, as the broad range of industries represented by *amici* demonstrates. The tax advantages of absentee retail-

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[5] *See* Eric T. Anderson, et al., *How Sales Taxes Affect Customer and Firm Behavior: The Role of Search on the Internet*, 47 J. of Mktg. Research 229, 237-239 (April 2010).

[6] Nick Wingfield & Nellie Bowles, *Jeff Bezos, Mr. Amazon, Steps Out*, N. Y. Times (Jan. 12, 2018), https://www.nytimes.com/2018/01/12/technology/jeff-bezos-amazon.html.

[7] *Id.* In 2017, Amazon began collecting taxes on its first-party sales, although not its marketplace sales. David Z. Morris, *Amazon to Collect Sales Tax in Most States Starting April 1st*, Fortune (Mar. 25, 2017), http://fortune.com/2017/03/25/amazon-sales-tax-april-1/.

[8] Thu-Huong Ha, *For Nearly Every Bookstore Barnes & Noble Loses This Year, Amazon Will Open a New One*, Quartz (Mar. 28, 2017), https://qz.com/943870/amazon-amzn-will-replace-nearly-every-bookstore-barnes-noble-bks-closes-in-2017/.

ing are driving all kinds of businesses away from local communities.

The physical-presence requirement arose when a bygone Commerce Clause approach, *see Quill*, 504 U.S. at 317, was applied to a bygone world of mail-order catalogs, *see Bellas Hess*, 386 U.S. at 754-55. At some point the law and the world can change so much that an old *per se* rule, having lost its *ratio decidendi*, also loses its *raison d'être*. *See, e.g., State Oil Co. v. Khan*, 522 U.S. 3, 21 (1997). That has happened with respect to state taxation of absentee retail. E-commerce has changed not only the scale of absentee retail—a more-than-thirtyfold increase from the $180 billion in *Quill*, 504 U.S. at 303, to the almost $6 *trillion* today[9]—but also its very nature. E-commerce is present *constantly* and active *everywhere*—it is ubiquitous and ultrapersonal—and it operates in ways that blur the supposedly bright line of physical presence.

These changes overcome *stare decisis*. And they have thwarted *Quill*'s pragmatic goals of simplifying legislation and preventing litigation. The premises and promises of the physical-presence requirement have not held true. Under such circumstances, absentee retailers cannot claim reliance interests that outweigh the need for doctrinal consistency, public solvency, and free competition.

South Dakota's law simply requires businesses to collect sales tax when they sell $100,000 in merchandise, or engage in 200 sales, in the State per year. This is a "minor ... duty" for major corporations, *DMA*, 135 S. Ct. at 1135 (Kennedy, J., concurring), one carried

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[9] Fox, *Inability to Collect Sales Tax*, *supra* note 2, at 576.

out by every brick-and-mortar retailer, from the biggest chain outlet to the humblest mom-and-pop store, whether they are selling in-store or online. To excuse absentee retailers from that duty would perpetuate "a serious, continuing injustice" to local communities and the retailers that serve them. *Id.* at 1134. And imposing the duty is entirely consistent with this Court's Commerce Clause requirement that a State limit its taxation to "activity" that has a "substantial nexus" to the State. *See Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). Upholding South Dakota's even-handed law will bring coherence to the Court's doctrine and fair competition to retail.

ARGUMENT

I. RETAIL HAS TRANSFORMED IN WAYS THAT DISPROVE THE ECONOMIC ASSUMPTIONS OF *QUILL* AND *BELLAS HESS*

The physical-presence requirement rests not only on an approach to the Commerce Clause that no longer exists, but also on a series of beliefs about sales tax and the retail economy that no longer hold true. *Bellas Hess* and *Quill* assumed that: (1) if absentee retail (then, mail-order) lost its tax shelter, it would not thrive; (2) if a retailer was not physically present in a State, it would not be persistently active there; (3) if absentee retailers were not required to collect taxes, their sales would be "tax exempt"; and (4) if an absentee retailer were required to collect sales taxes, the burden would be onerous.

As Justice Kennedy explained in his concurrence in *DMA*, these assumptions carried the day in *Quill* because the majority failed "to reevaluate *Bellas Hess* ... in view of the dramatic technological and social changes that had taken place in our increasingly interconnected economy." 135 S. Ct. at 1134–35. In deciding *this* case, the Court should not rest on old assumptions but can instead take stock of the "far-reaching systemic and structural changes in the economy" since *Quill*. *See id.* at 1135. Thus, in deciding whether to uphold South Dakota's law, the Court should consider that: (1) e-commerce is huge and robust and does not need a tax shelter; (2) e-commerce is omnipresent even without a physical footprint; (3) sales/use taxes are owed regardless of whether they are collected at the point of sale; and (4) collecting sales/use taxes online is straightforward.

A. E-Commerce Is Huge and Robust

E-commerce has transformed retail since *Quill* was decided. In 1992, less than 2% of Americans had some form of internet access,[10] and Amazon.com did not even exist; today, that number is about 89%,[11] Amazon's market capitalization is greater than Walmart,

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[10] The World Bank, *Individuals using the Internet (% of population)*, https://data.worldbank.org/indicator/IT.NET.USER.ZS?locations=US (last visited Feb. 28, 2018).

[11] Internet Live Stats, *United States Internet Users*, http://www.internetlivestats.com/internet-users/us/ (last visited Feb. 28, 2018).

Target and Costco combined,[12] and its CEO, Jeff Bezos, is "the richest person in history."[13]

Not only was this transformation unforeseen in *Quill*, it was unforeseeable. In 1995, three years after *Quill* was decided, *Newsweek* (still a print publication) scoffed at the notion that "[c]ommerce and business will shift from offices and malls to networks and modems" and declared that a "local mall does more business in an afternoon than the entire Internet handles in a month."[14] Three years later, Nobel Prize-winning economist Paul Krugman declared that "[b]y 2005 or so, it will become clear that the Internet's impact on the economy has been no greater than the fax machine's."[15] Today, the internet enables almost $6 trillion in e-commerce a year,[16] a sum more than thirty times the $180 billion for mail-order in *Quill*, 504 U.S. at 303.

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[12] Shan Li, *Amazon Overtakes Wal-Mart as Biggest Retailer*, Los Angeles Times (July 24, 2015, 1:06 p.m.), http://www.latimes.com/business/la-fi-amazon-walmart-20150724-story.html

[13] Chris Isidore, *Jeff Bezos is the Richest Person in History*, CNN (Jan. 9, 2018, 8:33 a.m.), http://money.cnn.com/2018/01/09/technology/jeff-bezos-richest/index.html.

[14] Clifford Stoll, *Why the Web Won't Be Nirvana*, Newsweek (Feb. 26, 1995, 7:00 p.m.), http://www.newsweek.com/clifford-stoll-why-web-wont-be-nirvana-185306.

[15] Jay Yarow, *Paul Krugman Responds To All The People Throwing Around His Old Internet Quote*, Business Insider (Dec. 30, 2013, 9:06 a.m.), http://www.businessinsider.com/paul-krugman-responds-to-internet-quote-2013-12.

[16] Fox, *supra* note 2, at 576.

The internet defied predictions precisely because it was so revolutionary. E-commerce has become not only vastly larger than mail-order ever was, but also far more robust. In *Quill*, the Court worried that "the mail-order industry's dramatic growth" depended on preferential tax treatment, a *de facto* subsidy and crutch that had become a necessary "part of the [industry's] basic framework." 504 U.S. at 316-17.

Whatever worries there may have been about mail-order's resilience, e-commerce "is here to stay," as Respondent Overstock.com puts it.[17] There is overwhelming evidence that requiring sales tax collection will not change that. To begin with, many of the businesses represented by *amici* operate successful online stores (as well as brick-and-mortar stores), and those online stores collect sales taxes. *Amici* thus speak from experience when they say that collecting sales taxes online is not a crippling burden. If e-commerce success required an exemption from sales tax collections, Wal-Mart would not be expanding its online portal and offering free second-day delivery without any membership fee.[18] Second, Amazon has begun collecting sales tax on its first-party sales nationwide, regardless of its physical presence,[19] and Amazon is

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[17] Overstock.com: Benefits of Equity, *supra* note 4, at 2.

[18] Alexandra Wolfe, *Marc Lore Looks to the Future of Online Shopping*, Wall St. J. (Jan. 26, 2018, 3:31 p.m.), https://www.wsj.com/articles/marc-lore-looks-to-the-future-of-online-shopping-1516998700.

[19] Kelly Phillips Erb, *Tax Free No More: Amazon To Begin Collecting Sales Tax Nationwide on April 1*, Forbes (March 27, 2017, 4:22 p.m.), https://www.forbes.com/sites/kellyphillipserb/2017/03/27/tax-free-no-more-amazon-to-begin-collecting-sales-tax-nationwide-on-april-1/#5bcf92414e59.

more successful than ever. Third, most absentee retailers *already* collect sales tax in multiple States where they have headquarters, warehouses, distribution centers, and so forth. Respondent Wayfair itself collects sales taxes in *22 States*.[20] And Wayfair is indisputably thriving: for its last reported quarter, "[d]irect [r]etail net revenue, consisting of sales generated primarily through Wayfair's sites, increased $348.8 million to *$1.2 billion*, up 41.9% year over year," yielding profits of $280.3 million.[21]

E-commerce will—indeed, *does*—make ample profit without *Quill*'s subsidy. There is thus no danger of e-commerce coming to an end if absentee, online-only retailers are required to collect sales taxes in more States than those in which they already collect taxes. To the contrary, it is virtually certain that e-commerce will become *cheaper* and *more efficient* once online-only retailers are no longer encouraged to eschew a physical presence to obtain an apparent price advantage. As Amazon's practices confirm, warehouses and distribution centers will be moved closer to population centers, reducing delivery times and cost. In fact, some absentee retailers might even decide to join the local community and open a store on Main Street, as Amazon has.[22]

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[20] Wayfair.com: Ordering Information, *supra* note 3.

[21] Wayfair.com, *Wayfair Announces Third Quarter 2017 Results*, http://s2.q4cdn.com/848638248/files/doc_financials/2017/Q3/Press-Release.pdf (last visited Feb. 11, 2018) (emphasis added) ("Wayfair.com Q3 2017 Press Release").

[22] Laura Stevens, *Amazon's Cashierless 'Go' Convenience Store Set to Open*, Wall St. J. (Jan. 21, 2018, 10:00 a.m.),

The only thing that will be lost if online-only retailers are required to collect sales tax is a "competitive advantage" that Members of this Court, economists, businesses large and small, and the States all recognize to be unfair. Any absentee retailer whose business model makes economic sense will survive in fair competition without the physical-presence "tax shelter."

B. Online-Only Retailers Are Persistently Active and Economically Present Despite Physical Absence

The "ability to conduct business without physical presence ha[s] created new problems not envisioned by rules developed in another era." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 431 (1994). "Today buyers have almost instant access to most retailers via cell phones, tablets, and laptops. As a result, a business may be present in a State in a meaningful way without that presence being physical in the traditional sense of the term." *DMA*, 135 S. Ct. at 1135 (Kennedy, J., concurring). Even a decade ago, Americans went online almost exclusively from their computers—typically at home or work—but today, almost 80% of Americans own smartphones.[23] Unsurprisingly, "[m]obile commerce is expected to account for 34.5% of total e-commerce sales this year, and it's further anticipated

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https://www.wsj.com/articles/amazons-cashierless-go-convenience-store-set-to-open-1516546801.

[23] Pew Research Center, *Mobile Fact Sheet*, http://www.pewinternet.org/fact-sheet/mobile/ (last visited Feb. 28, 2018).

to surpass 50% by 2021."[24] Thus, the entire online retail marketplace is now continuously present in the pockets and purses of the great majority of Americans.

This means that online retailers are actively present even inside the stores of their brick-and-mortar competitors. That presence enables the phenomenon of "showrooming": absentee retailers exploiting competitors' in-community stores as "showrooms" for products that the online-only retailer sells at a lower price—a cut rate often derived from the misleading lack of sales-tax collection. More than two-thirds of Americans aged 18 to 44 use their mobile devices to comparison shop online while in a brick-and-mortar store.[25] Showrooming has become so commonplace that the term was short-listed for "Word of the Year 2013."[26]

The interaction of "showrooming" with *Quill*'s tax distortion turns the best aspects of brick-and-mortar stores into competitive liabilities, as absentee retailers derive the benefit of physical presence without bearing its costs or tax-collection consequences. Online-only retailers are absent in the sense that they put nothing into a local community beyond their sales: they main-

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[24] Dan O'Shea, *Mobile Commerce to Dominate Online Sales by 2021*, Retail Dive (Oct. 29, 2017), https://www.retaildive.com/news/mobile-commerce-to-dominate-online-sales-by-2021/508403/.

[25] Cecillia Barr, *Growing Impact of Showrooming on Retail Businesses*, BFS Capital Blog (June 19, 2017), https://www.bfscapital.com/blog/impact-of-showrooming-on-retail-businesses/.

[26] https://en.oxforddictionaries.com/word-of-the-year/shortlist-2013 (last visited Feb. 28, 2018).

tain no store on Main Street; pay no rent or taxes; employ no workers; sponsor no little league teams or book talks. But, online-only retailers are deliberately present in another sense—omnipresent, even—through the apps and websites on their customers' desktops, laptops, tablets, and phones. And, when combined with showrooming, this *Quill*-subsidized presence lets absentee retailers leech sales from brick-and-mortar stores.

Community retailers provide a real value to customers, who come to local stores to try the merchandise: to see a necklace catch the light, to sit on a couch, to heft a hammer, to feel the fit of a pair of pants, to compare pictures on side-by-side TVs. They also come to pose questions to experienced sales staff who can direct customers through a maze of competing products to the one that best suits their particular needs, preferences, and budgets. It is all too easy to minimize these customer services—to literally "discount" the value added by the hardworking women and men in retail. But what they provide *is* valuable, whether in finding the right shoes based on a runner's fitness level, goals, injuries, and bone structure, or helping a pet owner choose the right dog food based on her pet's size and health history. Once customers have a chance to handle the wares and learn from trained specialists, they can better decide whether to buy and what to buy. Customers and competition both thrive when this kind of information, which community retailers are uniquely able to provide, is available.

Through showrooming, absentee retailers turn that service against the local stores that provide it. Because online-only retailers are constantly present via smartphones, customers can take their newly informed

decision about *what* to buy and then decide *where* to buy with a few taps and swipes, comparing the in-store price to an online price. That online price need not cover the costs of storefront retailing in rent, wear-and-tear, and salaries. And that online price often appears considerably discounted by purporting to be "tax-free." The online-only retailer can thus undercut the brick-and-mortar "showroom," stealing the sale[27]—a sale that was physically conducted just as it would have been had the customer made the purchase at the cash register.

The Politics & Prose bookstore in Washington, D.C., suffers from such showrooming. Bradley Graham, its co-owner, describes "customers who come into the store, avail themselves of our staff's expertise and recommendations," then "us[e] their phone cameras to take pictures of books" and buy them online—while still *standing in the store.*[28] Physically shopping at Politics & Prose is transformed into physically shopping at an online retailer. Almost all of the retailers represented by *amici* have had similar experiences.

Some brick-and-mortar retailers have tried to combat showrooming by matching the prices of their online competitors[29]—a tall order because online retailers not only avoid costs but also sell products *below* cost as loss

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[27] PwC, *Total Retail 2015: Retailers and the Age of Disruption* 6 (Feb. 2015), https://www.pwc.com/sg/en/publications/assets/total-retail-2015.pdf.

[28] Brief of the American Booksellers Association as *Amicus Curiae* in Support of Petition for Writ of Certiorari at 11 (Nov. 2, 2017) ("Booksellers' Brief").

[29] Barr, *supra* note 25.

leaders or to capture market share.[30] Most local businesses lack profit margins that would allow them to slash prices that deeply.[31] But even retailers who can match their online competitors' prices *still* cannot win because of the apparent sales tax differential.[32] The way the physical-presence requirement amplifies showrooming is demonstrated by the fact that showrooming has never been "much of an issue with [booksellers] in Washington State" because Amazon.com has always collected Washington sales taxes.[33]

That *Quill*'s tax advantage distorts retail in an e-commerce economy is not speculative or anecdotal, but proven by data. In 2010, researchers at MIT and Northwestern demonstrated that exempting absentee retailers from sales tax collection has a significant effect on e-commerce, but not on mail-order.[34] While

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[30] Monica Chin, *Amazon May Soon Launch a National Delivery Service*, Mashable (February 9, 2018), https://mashable.com/2018/02/09/amazon-may-soon-launch-delivery-service/#GUQDOu3.nmql.

[31] NYU Stern School of Business, *Margins by Sector (US)*, (January 2018), http://pages.stern.nyu.edu/~adamodar/New_Home_Page/datafile/margin.html.

[32] Brad Tuttle, *Best Buy Swears Shoppers Don't Have to Bother Showrooming Anymore*, Time (Feb. 20, 2013), http://business.time.com/2013/02/20/best-buy-swears-shoppers-dont-have-to-bother-showrooming-anymore/; Lance Muzslay, *It's More About Protecting a False Competitive Advantage than Difficulty in Collecting Sales Tax*, 21st Century Retail (June 24, 2015), http://www.efairness.org/blog/2015/06/its-more-about-protecting-a-false-competitive-advantage-than-difficulty-in-collecting-sales-tax/.

[33] Booksellers' Brief, *supra* note 28, at 14-15.

[34] Anderson, *Sales Taxes*, *supra* note 5, at 229-239.

there was no apparent "reaction to sales taxes in the catalog channel," there was a considerable benefit to the apparent tax exemption in e-commerce.[35] Other studies confirm this result.[36] This difference results, at least in part, from the ease of comparison shopping on the internet, which aggregates, organizes, and provides instantaneous access to vast amounts of retail information.[37] In such comparisons, an apparent tax discount can be decisive.

These problems extend beyond retail to wholesale, where e-commerce is also a growing trend.[38] And while States tax wholesale and retail differently, *Quill* and *Bellas Hess* can similarly distort wholesale transactions. As with retail, the result has been a siphoning of community wholesaler business by absentee wholesalers. And here, too, showrooming takes place: 93% of business buyers prefer to purchase online after deciding what products to buy.[39]

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[35] *Id.* at 236.

[36] Liran Einav et al., *Sales Taxes and Internet Commerce*, Nat'l Bureau of Econ. Research (April 2012), http://www.nber.org/papers/w18018.pdf; Brian Baugh et al., *Can Taxes Shape an Industry? Evidence from the Implementation of the "Amazon Tax"* Nat'l Bureau of Econ. Research 4-5 (April 2014, revised, Jan. 2018), http://www.nber.org/papers/w20052.pdf

[37] Anderson, *Sales Taxes*, *supra* note 5, at 235-37.

[38] Andy Hoar et al., *B2B eCommerce: A Trillion Dollars for the Taking*, Forrester Research (July 26, 2016), https://www.forrester.com/report/B2B+eCommerce+A+Trillion+Dollars+For+The+Taking/-/E-RES82102.

[39] Ronak Meghani, *B2B E-Commerce Startups Should Check This Infographic for the Latest Trends* (Jan. 24, 2018),

A decade ago, this Court reversed a long-standing antitrust *per se* prohibition of resale price maintenance because that prohibition had fueled an analogous kind of low-tech showrooming:

> [D]iscounting retailers can free ride on retailers who furnish services and then capture some of the increased demand those services generate. Consumers might learn, for example, about the benefits of a manufacturer's product from a retailer that invests in fine showrooms, offers product demonstrations, or hires and trains knowledgeable employees. Or consumers might decide to buy the product because they see it in a retail establishment that has a reputation for selling high-quality merchandise. If the consumer can then buy the product from a retailer that discounts because it has not spent capital providing services or developing a quality reputation, the high-service retailer will lose sales to the discounter, forcing it to cut back its services to a level lower than consumers would otherwise prefer.

Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 890–91 (2007) (citations omitted). The greater harm of e-commerce "showrooming" warrants reversing the *per se* physical-presence requirement here.

C. Absentee Retail Sales Are Not "Tax Exempt"

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https://e27.co/b2b-e-commerce-startups-check-trends-2018-infographic-20180124/.

The *Quill* majority described absentee retailers as operating in "a discrete realm of commercial activity that is free from interstate taxation," such that their sales enjoyed an "exemption from state taxation." 504 U.S. at 315-16. This same misconception is fostered by absentee retailers like Wayfair who hold themselves out like airport duty-free stores that are not "subject to a sales tax."[40] In reality, the customers still owe the tax; they just do not know it.

Quill's reasoning and these advertisements conflate two distinct concepts: retailers' obligation to *collect* sales taxes and customers' obligation to *pay* sales taxes. *Quill* likely did so because, when it was decided, it was infeasible for States to identify customers of absentee retailers, and the amount of lost sales taxes—while large—was not yet the "extreme harm" now depriving States of their ability to fund their "education systems, healthcare services, and infrastructure." *DMA*, 135 S. Ct. at 1134-35 (Kennedy, J., concurring).

Today, the physical-presence requirement may free large corporations like Wayfair from "some minor tax-collection duty," *id.* at 1135, but it does not free Wayfair's *customers* of their obligation to pay those taxes. "Use taxes are still due, but ... they must be collected from and paid by the customer, not the out-of-state seller." *Id.* at 1134. With great efforts, States today attempt to collect those taxes. Colorado requires absentee retailers to report their customers' purchases. Colo. Rev. Stat. § 39–21–112(3.5). Vermont has sent "close to 20,000 letters to Vermonters telling them they

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[40] Wayfair.com: Ordering Information, *supra* note 3.

may owe sales tax for online and other purchases."[41] Connecticut did the same.[42] Such cumbersome collection attempts are necessary to recoup some of the billions in tax revenue that otherwise will be lost.

Because absentee retailers cannot claim a legitimate interest in benefiting from customers' failure to pay taxes, the only *legitimate* advantage flowing from *Quill* is the avoided expense of adding a tax-collection widget to their websites. As explained below, that cost is trivial. But the *illegitimate* "competitive advantage," *DMA II*, 814 F.3d at 1150 (Gorsuch, J., concurring), is substantial: the misimpression that their goods cost less because they are not "subject to a sales tax." That competitive advantage comes in three forms, each worse than the last. First, some customers believe the purchase price is all they owe; later learn of the need to pay the tax; and then pay the tax—what amounts to a bait-and-switch on the price. Second, some customers never learn of the tax and unwittingly violate their States' tax laws. Third, some customers, knowing of the tax, nevertheless do not pay it, cheating their States with the help of absentee retailers. In all of these instances, the absentee retailer exploits an apparent "discount" that does not exist. Justice White

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[41] Morgan True, *State Sending 20,000 Letters to Collect Alternative Sales Tax*, Brattleboro Reformer (Sept. 4, 2017, 5:33 p.m.), http://www.reformer.com/stories/state-sending-20000-letters-to-collect-alternative-sales-tax,518443.

[42] Mark Davis, *State Finds New Way to Collect Sales Tax for Online Sales*, WTNH (Feb. 15, 2018, 9:49 a.m., updated 8:01 p.m.), http://wtnh.com/2018/02/15/state-finds-way-to-collect-sales-tax-on-online-purchases/.

rightfully denounced this as an illegitimate "tax shelter." *Quill*, 504 U.S. at 329

D. Collecting Sales Taxes Online Is a "Minor Duty," Not a Great Burden

In *Bellas Hess*, 386 U.S. at 759-60, and *Quill*, 504 U.S. at 313 n.6 (quoting *Bellas Hess*), the majorities feared that, without the physical-presence requirement, mail-order retailers would be "entangle[d] ... in a virtual welter of complicated obligations." Now, advances in computer technology and homogenization in tax law have made this burden trivial—a "minor ... duty," *DMA*, 135 S. Ct. at 1135 (Kennedy, J., concurring), easily carried out by any retailer with the wherewithal to establish a substantial e-commerce presence.

For example, TaxCloud is a free product that calculates sales tax for every tax jurisdiction in the United States based on a customer's address, and continuously updates itself to reflect changes in tax exemptions, rates, and holidays.[43] It is used by over 18,500 online retailers, including many of *amici*'s members, and it comes "integrated with over 85 e-commerce platforms" and offers "[f]ree public sales tax APIs" that work with any system.[44] It is far from the only option.[45]

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[43] Tax Cloud, *Welcome*, https://taxcloud.net/#Welcome (last visited Feb. 28, 2018).

[44] *Id.*

[45] *See* Brief of National Retail Federation as *Amicus Curiae* in Support of Petition for Writ of Certiorari at 19-24 (Nov. 1, 2017).

Given this technology, there is no plausible explanation for why Wayfair can manage sales-tax collection in 22 States, but not the rest of the Nation. We know Wayfair and other absentee retailers could do so because the fourth defendant in this case, Systemax, "*immediately* began collecting taxes under the law" after settling with the State. Pet. App. 10a (emphasis added). If Systemax could toggle the widget on its website to collect sales taxes, so can other absentee retailers.

II. THE TRANSFORMATION OF THE RETAIL ECONOMY MEANS THAT *STARE DECISIS* CANNOT JUSTIFY RETAINING THE PHYSICAL-PRESENCE REQUIREMENT

By the time of *Quill*, the physical-presence requirement conflicted with numerous dormant Commerce Clause decisions permitting taxation of any business activity that creates a substantial nexus with the taxing State. 504 U.S. at 311-16 (citing *Complete Auto*, 430 U.S. at 279). The *Quill* majority acknowledged this conflict—which has only grown worse, *DMA II*, 814 F.3d at 1150-51 (Gorsuch, J., concurring)—but held that *stare decisis* mandated retaining the requirement. Given the profoundly changed circumstances discussed above, that is no longer true.

Stare decisis is not an inexorable command. When the world changes, it is often appropriate for the law to change as well. *See American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266 (1987). The Court is particularly willing to reconsider precedent where such changes have made prior dormant Commerce Clause rules obsolete and counterproductive. For instance, in

Granholm v. Heald, 544 U.S. 460, 492 (2005), the Court departed from prior precedent allowing discrimination against out-of-state liquor sellers because "improvements in technology have eased the burden of monitoring out-of-state wineries." Similarly, the Court will not maintain "*per se*" bright-line antirust rules that "remain[] forever fixed" while the "economic realities ... have changed." *Khan*, 522 U.S. at 21.

Even in 1992, *Quill*'s *per se* rule created a sharp division based on "an anachronistic notion of physical presence" that one could not even "attempt to justify ... in economic terms" because "in today's economy, physical presence frequently has very little to do with a transaction a State might seek to tax." 504 U.S. at 328 (White, J., concurring in part and dissenting in part). But back then, the majority could claim that "the *Bellas Hess* rule appears artificial [only] at its edges." *Id.* at 315. Today, the rule looks artificial to its very core.

That anachronistic, ill-fitting, and unfair rule cannot be justified based on "settled expectations" and "reliance interests." *Id.* at 316-17. The world and the law have changed too much, and the reliance interests in avoiding the direct costs of sales-tax collection are too slight.

Moreover, brick-and-mortar retailers have powerful reliance interests, too. Over the course of decades, they invested billions of dollars to literally build up local communities, only to discover that this footprint carries a significant competitive tax disadvantage when it comes to retail sales, whether in their own stores *or* via their online portals. Far from vindicating "settled expectations" and "reliance interests," the intersection of *Quill* and e-commerce created an entirely unforesee-

able competitive disadvantage for the businesses that invested in their communities. Indeed, retailers hesitate to expand into new states for that reason,[46] fearing—as Respondent Overstock.com puts it—that it is not "worth the cost of additional sales tax burden to open a new facility in [a new] state."[47] The physical-presence requirement is thus thwarting the Commerce Clause purpose it is meant to advance: economic integration among the States.

The "dramatic changes in factual circumstances" of the retail industry justify "a departure from precedent under the prevailing approach to *stare decisis*." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 534 (2009) (Thomas, J., concurring). "It's no secret the retail industry is undergoing a transformational period,"[48] and the Court should not distort that transformation through the physical-presence requirement simply to keep *Bellas Hess* and *Quill* on the books. As Respondent Overstock.com acknowledges, "[r]emoving obstacles to growth and expansion" will mean "more growth," "more jobs," and "a bigger and better economy."[49]

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[46] *See* Anderson, *Sales Taxes*, *supra* note 5, at 237-39.

[47] Overstock.com: Benefits of Equity, *supra* note 4, at 2.

[48] Corinne Ruff & Ben Unglesbee, *The Running List of 2017 Retail Apocalypse Victims*, Retail Dive (Dec. 13, 2017), http://www.retaildive.com/news/retail-bankruptcies-2017/446086/.

[49] Overstock.com: Benefits of Equity, *supra* note 4, at 2.

III. THE COURT SHOULD UPHOLD SOUTH DAKOTA'S LAW, WHICH FITS WITH THE COMMERCE CLAUSE AND THE RETAIL ECONOMY, WHILE *QUILL'S* PHYSICAL PRESENCE REQUIREMENT DOES NOT

Because backwards-looking *stare decisis* can no longer insulate the physical-presence requirement from review, three forward-looking considerations are before the Court: whether South Dakota's approach better accords with the Commerce Clause (rather than departing from it), better reflects economic reality (rather than distorting it), and better fulfills *Quill*'s practical goals (rather than thwarting them). The answer to all three is yes. As Justices Kennedy and Gorsuch have made clear, the physical-presence requirement is both inconsistent with prevailing Commerce Clause jurisprudence and economically unfounded and unfair. Furthermore, it is causing legislative and litigative uncertainty and instability. Accordingly, the Court should uphold South Dakota's law and the "economic presence" approach on which it rests.

A. South Dakota's Law Accords with the Commerce Clause, While the Physical-Presence Requirement Does Not

South Dakota's law focuses on a retailer's sales *activity*, rather than its physical footprint, and thus accords with decades of Commerce Clause precedent establishing that a State can properly tax "activity" that has a "substantial nexus" to the State. *See Complete Auto*, 430 U.S. at 279. It cannot seriously be maintained that a retailer engaging in over 200 transactions or over $100,000 worth of sales in the relatively small South Dakota market "is not sufficiently con-

nected to the State to justify a tax." *Id.* at 287; *cf. Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 184 (1995) ("It has long been settled that a sale of tangible goods has a sufficient nexus to the State in which the sale is consummated to be treated as a local transaction taxable by that State."). Indeed, *Quill* itself held that due process did not bar the imposition of tax-collection duties on absentee retailers, 504 U.S. at 308, and "[t]here is no reason to suppose that this latitude afforded the States under the Due Process Clause is somehow divested by the Commerce Clause." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 623 (1981).

The physical-presence requirement, by contrast, is a vestige of a now-rejected approach to the Commerce Clause, one that *Quill* acknowledged to be outmoded even 25 years ago. *See* 504 U.S. at 317. As Justice Kennedy explained, the "*Quill* majority acknowledged the prospect that its conclusion was wrong." *DMA*, 135 S. Ct. at 1134. And the Court's Commerce Clause approach has continued to move away from *Quill* in the quarter-century that followed, further eroding the already-diminished doctrinal support the rule had in 1992. *See DMA II*, 814 F.3d at 1150-51 (Gorsuch, J., concurring).

B. South Dakota's Law Fairly Reflects Economic Reality, While the Physical-Presence Requirement Unfairly Distorts It

As explained above, the economic reality is that e-commerce—carried out by both community and absentee businesses—is a huge, growing, always present, and highly active retail channel. The ability of absen-

tee e-commerce to skirt sales-tax collection thus "inflict[s] extreme harm and unfairness on the States" and "local retailers and their customers," *DMA*, 135 S. Ct. at 1134-35 (Kennedy, J., concurring), thereby undermining necessary government services and venerable American companies alike. States are no longer willing to leave the sales taxes on absentee e-commerce uncollected. The question is whether States may ask large absentee businesses to help collect those taxes at the point of sale (as community retailers have *always* done in States that impose sales taxes) or whether the States must attempt to collect those taxes from each resident customer, one-by-one, at the end of the tax year.

With good reason, South Dakota has opted for the former. Because that approach fits with economic reality, South Dakota's sales tax is fair, transparent, easy to pay, and efficient to collect. This satisfies the four principles of sound taxation known since Adam Smith published *The Wealth of Nations*: (1) like enterprises should be taxed alike (fair); (2) taxes should be clear to the taxpayer (transparent); (3) taxes should be collected at the most opportune moment for the taxpayer (easy); and (4) governments should collect the taxes with the least amount of friction (efficient). *See* Tyler A. LeFevre, *Justice in Taxation*, 41 Vt. L. Rev. 763, 769-70 (2017).

In contrast, the approach dictated by the physical-presence rule is unfair, opaque, tricky, and costly, as demonstrated by comparing that approach to South Dakota's for a hypothetical Wayfair.com sale.

First, under South Dakota's approach, the transaction will be taxed identically whether the retailer is

Wayfair or Walmart. Under the physical-presence approach, the transactions are treated differently: sales tax will not be collected on Wayfair.com because Wayfair has avoided any South Dakota real-estate footprint; but tax will be collected on Walmart.com because, somewhere in South Dakota, Walmart operates a brick-and-mortar store (even though the product was neither sold at, nor shipped from, that store). *See Quill*, 504 U.S. at 328 (White, J., concurring in part and dissenting in part) (noting that under the physical-presence requirement, "an out-of-state seller with one salesperson in a State would be subject to use tax collection burdens on its entire mail-order sales even if those sales were unrelated to the salesperson's solicitation").

Second, under South Dakota's approach, the customer knows at the time of purchase how much sales tax is owed. Under the physical-presence approach, she does not. Instead, she is directed by Wayfair.com to "check your state's regulations before you shop"[50] and figure out for herself the tax calculation that Wayfair claims is too hard for a billion-dollar corporation to manage. That is, assuming she even knows that a tax is owed, something that Respondent Overstock.com admits is the subject of "confusion."[51]

Third, under South Dakota's approach, the tax is collected at the point of sale as part of the transaction. Under the physical-presence approach, the customer must keep records of every untaxed online purchase she has made over the course of the year and set aside

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[50] Wayfair.com: Ordering Information, *supra* note 3.

[51] Overstock.com: Benefits of Equity, *supra* note 4, at 1.

money to make sure she will be able to pay what is owed come April 15.

Fourth, under South Dakota's approach, the State receives the collected sales taxes in the same routine way it receives them from every other non-absentee retailer, whether the sale was made at a store or online. Under the physical-presence approach, the State must find some circuitous route to collect the taxes owed. For instance, it might compel the absentee retailers to supply lists of customers and their purchases (like Colorado), or send dunning letters to its residents (like Vermont and Connecticut). While understandable as workarounds to *Quill*'s physical-presence requirement, these methods intrude on privacy, significantly burden consumers and retailers, cost the State more, and fare poorly at tax collection—ultimately requiring States to make up for the shortfall with other forms of taxation. *See DMA*, 135 S. Ct. at 1135 (Kennedy, J., concurring). In a word: inefficient.

These differences should come as no surprise: when the law reflects economic reality, it provides the right tools for the job. When the law ignores and distorts economic reality, it compels States to use inferior tools. And when the wrong tools are used, the result is inefficient and sometimes destructive.

C. South Dakota's Law Is Administrable and Clear, While the Physical-Presence Requirement Is Causing Litigation and Confusion

In *Quill*, the Court hoped that the physical-presence requirement would: (1) provide clear guidance to legislatures regarding the taxation of absentee retailers; (2) "reduce[] litigation concerning those taxes"; and

thereby (3) lead States and business out of a "quagmire" of "controversy and confusion." 504 U.S. at 315. In fact, it is *South Dakota's* approach that fulfills these hopes, while the physical-presence requirement has failed them.

South Dakota's standard is simple for legislatures, easy for courts, and clear for businesses. It establishes a high, bright-line threshold for what constitutes a substantial connection to the state. Unlike under the North Dakota law at issue in *Quill*, no business will need to retroactively collect taxes; no mom-and-pop mail-order company will inadvertently cross the threshold by making "three calls into the State"; and even ingenious lawyers will be hard pressed to read ambiguities into the law. *See id.* at 313 & n.6. Unsurprisingly, South Dakota's approach has already proved popular with other States such as Tennessee (with a $500,000 threshold), Wyoming ($100,000), and Alabama ($250,000).

No doubt the absentee retailers will insist that even if the law at issue in *this* case is bright and clear, other States will aggressively legislate lower and vaguer thresholds. But why? States, too, benefit from certainty and stability in tax collection, and they have every reason to operate consistently with the decades-old "substantial nexus"/economic "activity" approach normally applied to their tax laws. *See Complete Auto Transit*, 430 U.S. at 279. Moreover, at less than $100,000 worth of sales, even States with high sales taxes would hardly recover sums that would merit litigating over exactly what level of business activity and economic presence is too slight "to justify a tax." *Id.* at 287.

What concerns States—and what concerns *amici* and should concern this Court—is not whether a small business selling a few hundred dollars' worth of trinkets online is collecting sales tax but whether a giant corporation with *billions* of dollars in sales is doing so. For instance, whether Wayfair can boast that "[o]ne of the best things about buying through Wayfair is that we do not have to charge sales tax"[52] even while "sales generated primarily through Wayfair's sites[] increased $348.8 million to *$1.2 billion*."[53] It is *that* failure to collect sales taxes that is distorting the private retail industry and jeopardizing the public fisc.

South Dakota's even-handed and efficient method for collecting sales tax is superior to the efforts of other States "to find ways of achieving comparable results through different means." *See DMA II*, 814 F.3d at 1151 (Gorsuch, J., concurring). States pursue these circuitous approaches *knowing* them to be inefficient, but fearing that there are no better alternatives permissible under *Quill*.[54] Some States have imposed requirements short of collection where physical presence is lacking, "consciously stop[ping] (just) short of doing what *Quill*'s holding forbids." *DMA II*, 814 F.3d at 1148. (analyzing Colo. Rev. Stat. § 39–21–112(3.5)). Others have attempted to stretch what *Quill* permits by employing novel definitions of physical presence.

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[52] Wayfair.com: Ordering Information, *supra* note 3.

[53] Wayfair.com Q3 2017 Press Release, *supra* note 21, at 1 (emphasis added).

[54] *See, e.g.*, Matthew Nesto, *Conn. Embarks On Aggressive Effort to Collect Online Tax*, Law360 (Feb. 20, 2018, 6:45 p.m.), https://www.law360.com/articles/1013422/conn-embarks-on-aggressive-effort-to-collect-online-tax.

See, e.g., 830 Mass. Code Regs. 64H1.7 (defining "physical presence" to include, *inter alia*, "the use of in-state software (*e.g.*, 'apps') and ancillary data (*e.g.*, 'cookies') which are distributed to or stored on the computers or other physical communications devices of a vendor's in-state customers"). These approaches are prone to practical and legal challenges.

Even without legislative novelties, the physical-presence requirement provides no certainty. As Justice White recognized in *Quill*, there is no clear standard for what suffices the requirement. 504 U.S. at 330 & n.3. And with the rise of ubiquitous and ultra-personal shopping,[55] the task of ascertaining "physical presence" has only gotten more complicated.

For instance, when absentee retailer MM.LaFleur operated a "pop-up" store in the San Jose Fairmont from February 21 through February 25,[56] was it "physically present" in California? If so, must it collect sales taxes during just those five days, or for the whole year? What about the long tail of online sales that will be generated in future years from the "buzz" of its pop-up store?

What about when MM.LaFleur ships a "bento box" of clothes for a customer to try on, which the customer must decide to keep or return within four days?[57] *Quill* avoided that issue because the North Dakota

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[55] (R)Tech, *Pressures Driving Industry Change*, http://rtech.org/pressures-driving-industry-change/ (last visited Mar. 2, 2018).

[56] MM.LaFleur, Locations, https://mmlafleur.com/locations (last visited Mar. 1, 2018)

[57] MM.LaFleur, *Start a Bento*, https://mmlafleur.com/bento (last visited Mar. 1, 2018).

courts had assumed that title passed to the customer "when the merchandise was received." 504 U.S. at 302 n.1. But if state law holds that the seller retains title until the return period ends, is the "bento box" sufficient physical presence?

In late 2012, Warby Parker—a primarily-online retailer—sent a merchandise-laden bus on a 4,350-mile trip to "bring [its] showroom experience" to "nine cities ... across the country."[58] Was Warby Parker "physically present" in those nine cities? Or was its bus analogous to a semi-trailer carrying Wayfair's products? If it was physically present in States where it stopped, what about States it merely crossed? Does it matter that Warby Parker drummed up sales by advertising the physical presence of its bus and employees even in locations where they never set up shop?[59]

Given these uncertainties, the physical-presence requirement has the harshness of Draconian law but not the stability. *Quill* was thus wrong when it concluded that the "artificiality" of the physical-presence requirement would be "more than offset by the benefits of a clear rule." 504 U.S. at 315. The physical-presence requirement does not, in today's retail economy, "firmly establish[] the boundaries of legitimate state authority to impose a duty to collect sales and use taxes" or "reduce[d] litigation concerning those taxes."

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[58] Warby Parker, *The Warby Parker Class* Trip, https://blog.warbyparker.com/the-warby-parker-class-trip/ (last visited Mar. 1, 2018).

[59] E.g., Warby Parker, *Fourteen Hours in New* Orleans, https://blog.warbyparker.com/fourteen-hours-in-new-orleans/ (last visited Mar. 1, 2018).

Id. To the contrary, the porous, shifting, and artificial boundaries imposed by *Quill* on state taxing authority have given rise to litigation in Alabama, Colorado, Indiana, Massachusetts, South Carolina, Tennessee, and Wyoming,[60] with more sure to come.

In short, the physical-presence requirement does not prevent legislative confusion, litigative expense, or business uncertainty. It merely gives absentee retailers an unfair and misleading tax advantage. However fervently absentee retailers want to preserve that advantage, it is not a desire this Court should gratify. Instead, this Court should expressly recognize that the "economic presence" standard of South Dakota's law passes constitutional muster.

IV. THE COURT SHOULD NOT EXPECT CONGRESS TO CORRECT THE CONSTITUTIONAL ERROR OF *BELLAS HESS* AND *QUILL*

The Court should not repeat the *Quill* majority's decision to retain the physical-presence requirement, despite the requirement's being "inconsistent with our Commerce Clause jurisprudence," on the theory that "Congress has the ultimate power to resolve" it. 504 U.S. at 318. The *legal* question before this Court—about the Constitution's default allocation of sales-taxing power between the States and Congress—is different from the *political* question that an e-commerce tax bill would put before Congress. The

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[60] *See* Retail Litigation Center, *eFairness Litigation: Leveling the Playing* Field, http://www.rila.org/enterprise/retaillitigationcenter/efairnesslitigation/Pages/eFairness%20Litigation.aspx (last visited Mar. 1, 2018).

legal question can, and must, be answered by this Court.

Until then, the legal answer provided in the past by *Bellas Hess* and *Quill* will continue to exert outsized influence on the political process. With the physical-presence requirement in place, Congress now must decide whether to pass legislation that could be misinterpreted as levying taxes on a popular "realm of commercial activity that [appears] free from interstate taxation." *Quill*, 504 U.S. at 315. Even if Congress would never consider stripping States of their authority to impose sales-tax-collection duties on highly economically active, but physically absent, retailers, it may nevertheless be reluctant to pass legislation undoing the effects of *Bellas Hess*. A political soundbite cannot capture the benefits of federalism and the distinction between requiring retailers to *collect* taxes and requiring customers to *pay* taxes in the face of simplistic assertions of a "tax hike" on e-commerce.

As this Court has recognized, "it is hard to see how the judiciary can wash its hands of a problem it created." *See Exxon Shipping Co. v. Baker*, 554 U.S. 471, 507 (2008). "[I]n the absence of congressional action[,] this Court has prescribed the rules which determine the power of states to tax interstate traffic, and therefore [this Court] should alter these rules if necessary." *Capitol Greyhound Lines v. Brice*, 339 U.S. 542, 546 (1950), *abrogated on other grounds by Am. Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167 (1990). "[W]hen we err in areas of judge-made law, we ought to presume that Congress expects us to correct our own mistakes—not the other way around." *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2426 (2014) (Thomas, J., concurring in the judgment). And where the Court

has intervened in interstate commerce with a "fixed" judge-made rule, it has the obligation to intervene again to correct that rule if it is no longer consistent with "economic realit[y]." *See Khan*, 522 U.S. at 21.

Correcting a misinterpretation of the Commerce Clause is the proper role of the Court, not Congress, for "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

CONCLUSION

The Court should uphold South Dakota's law and eliminate the physical-presence requirement.

Respectfully submitted,

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